Malaysian Motor Insurance Pool (formerly known as HRMIP) v Naza Motor Trading Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-14 OF 2010(W)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA) AND JAMES FOONG FCJ
19 OCTOBER 2011

Insurance — Motor insurance — Policy of insurance — Claim on policy — Defendant repudiated liability by relying on exclusion clause — Whether loss incurred due to theft, which entitled plaintiff to make claim under policy, or cheating, which excluded defendant's liability — Whether definitions under Penal Code ought to apply — Whether exclusion clause would apply — Whether there was conflict between relevant provisions of policy — Penal Code ss 378 & 415

Naza Motor Trading Sdn Bhd ('the plaintiff') was the owner of a Mercedes Benz E230 (the motorcar), while Malaysian Motor Insurance Pool ('the defendant') was the insurance company that had agreed to provide cover and to indemnify the plaintiff in respect of any loss or damage to its motorcars arising from, inter alia, theft. The plaintiff claimed that the motorcar was stolen by a customer, who had misrepresented himself as one Dato' Ahmad Rosli Bachik, and requested to test drive the car. The plaintiff's sales representative, who had accompanied the customer during the test drive, was asked by the customer to buy fried chicken for him. When this sales representative returned with the fried chicken, he discovered that both the customer and the motorcar had disappeared. A police report was duly lodged by the plaintiff to report the loss of the motorcar. The plaintiff then intimated a claim for the sum of RM263,779.34 under the policy, but the defendant repudiated liability. The defendant sought to exclude its liability pursuant to cl 8 of the general exceptions to the insurance policy (cl 8) on the grounds that it was not responsible for the loss of the motorcar which was a result of cheating and not theft. The issue for determination was whether the loss incurred by the plaintiff was due to theft which entitled the plaintiff to make the claim under the policy or cheating which excluded the defendant's liability. The High Court judge found that the loss of the motorcar was caused by cheating under cl 8 and dismissed the plaintiff's claim. The plaintiff appealed to the Court of Appeal, which held that the loss of the motorcar was due to theft and allowed the appeal. Thereafter, the defendant obtained leave to proceed with the present appeal. The defendant submitted that the loss did not fall within the definition of theft in the Penal Code and as such was not within the ambit of the coverage of the policy. The defendant further submitted that if the loss fell within the definition of theft, then the claim was only payable if none of the exclusion

clauses applied; but since cl 8 applied, in that the facts of the case involved cheating, the plaintiff's claim was excluded.

Held, dismissing the appeal with costs:

(1) The term 'theft' in section I of the policy did not expressly stipulate any definition, whereas the term 'cheating' in exclusion cl 8 expressly stipulated that the term was as defined under the Penal Code ('Code'). In the circumstances the Court of Appeal was right in finding that since the liability or repudiation of liability hinged upon the commission of criminal offences, namely theft or cheating, that the definitions under the Code ought to apply (see para 9).

(2) In the present case, the customer was given possession of the motorcar for a specific limited purpose, namely to test drive the car accompanied by the plaintiff's sales representative. As such, the consent was a qualified one and not for a false representation by the said customer. In the circumstances, the motorcar was dishonestly taken away by the customer without the consent of the plaintiff's sales representative. Thus this court upheld the finding of the Court of Appeal that the loss was due to theft and not cheating. Further, it was found that the facts of the case could not fit with any of the explanations or illustrations as envisaged by s 415 of the Code to fall under the offence of cheating. On the facts of the present case, even if there was any element of deceit by the said customer, it was just to facilitate the commission of the act of theft (see paras 12–14).

(3) It was found that exclusion cl 8 was not operative unless the events leading to the loss of the motorcar could be regarded as the proximate cause of the loss or the inevitable cause of the loss. In the present case, the proximate cause of the loss of the motorcar was in fact the act of theft by the customer and not cheating. As such, cl 8 did not apply in this case and there was no conflict between the relevant provisions of the insurance clauses (see paras 15 & 20).

[Bahasa Malaysia summary

Naza Motor Trading Sdn Bhd (plaintiff') adalah pemilik Mercedes Benz E230 ('motokar'), sementara Malaysian Motor Insurance Pool ('defendan') adalah syarikat insurans yang berjanji untuk memperuntukkan perlindungan dan untuk membayar ganti rugi kepada plaintif berkaitan apa-apa kerugian atau kerosakan kepada motokar-motokarnya berbangkit daripada, antara lain, kecurian. Plaintif mendakwa bahawa motokar dicuri oleh pelanggan, yang memperkenalkan dirinya sebagai seorang yang bernama Dato' Ahmad Rosli Bachik, dan memohon untuk menguji pandu motokar tersebut. Wakil penjual plaintif, yang mengiringi pelanggan semasa uji pandu tersebut, disuruh oleh pelanggan tersebut untuk membeli ayam goreng untuk dirinya. Apabila wakil penjual tersebut kembali dengan ayam goreng, dia mendapati kedua-dua

pelanggan dan motokar tersebut lesap. Laporan polis dibuat oleh plaintif untuk melaporkan kecurian motokar tersebut. Plaintif kemudiannya menuntut tuntutan untuk sejumlah RM263,779.34 di bawah polisi tersebut, tetapi defendan tidak mengaku liabiliti. Defendan memohon untuk mengecualikan liabilitinya berikutan klausa 8 Pengecualian Am kepada polisi insurans tersebut (klausa 8) atas alasan bahawa ia tidak bertanggungjawab untuk kecurian kereta tersebut yang mana adalah akibat penipuan dan bukan kecurian. Isu untuk penentuan adalah sama ada kerugian yang dialami oleh plaintif akibat kecurian yang memberikan hak kepada plaintif untuk membuat tuntutan di bawah polisi atau penipuan yang mengecualikan liabiliti defendan. Hakim Mahkamah Tinggi mendapati bahawa kerugian motokar tersebut disebabkan oleh penipuan di bawah klausa 8 dan menolak tuntutan plaintif. Plaintif merayu ke Mahkamah Rayuan, yang memutuskan bahawa kerugian motokar tersebut akibat kecurian dan membenarkan rayuan. Defendan kemudiannya memperolehi kebenaran untuk meneruskan dengan rayuan ini. Defendan berhujah bahawa kerugian tidak terangkum di dalam perlindungan polisi tersebut. Defendan selanjutnya berhujah bahawa jika kerugian terangkum dalam definisi kecurian, oleh itu tuntutan hanya boleh dibayar jika tidak satu pun daripada klausa-klausa pengecualian tersebut beraplikasi; tetapi memandangkan klausa 8 beraplikasi, dalam fakta kes yang melibatkan penipuan, tuntutan plaintif adalah dikecualikan.

Diputuskan, menolak rayuan dengan kos:

(1) Terma 'theft' dalam seksyen I polisi tidak secara nyata menjelaskan apa-apa definisi, sebaliknya terma 'cheating' dalam klausa 8 pengecualian secara nyata menjelaskan bahawa terma seperti yang didefinisikan di bawah Kanun Keseksaan ('Kanun'). Dalam keadaan ini Mahkamah Rayuan adalah betul dalam memutuskan bahawa memandangkan liabiliti atau pembatalan liabiliti bergantung pada perbuatan melakukan kesalahan jenayah, iaitu kecurian atau penipuan, definisi-definisi di bawah Kanun patut beraplikasi (lihat perenggan 9).

(2) Dalam kes ini, pelanggan diberi milikan motokar tersebut bagi tujuan terhad yang spesifik iaitu untuk uji pandu motokar tersebut diiringi oleh wakil jualan plaintif. Oleh itu, kebenaran adalah bersyarat dan bukan untuk representasi salah oleh pelanggan tersebut. Dalam keadaan ini, motokar tersebut telah secara tidak jujur diambil oleh pelanggan tersebut tanpa kebenaran wakil penjual plaintif. Oleh itu mahkamah ini mengesahkan keputusan Mahkamah Rayuan bahawa kerugian adalah akibat kecurian dan bukan penipuan. Selanjutnya, didapati bahawa fakta-fakta kes tidak terangkum dalam mana-mana penjelasan atau ilustrasi seperti yang ditetapkan s 415 Kanun untuk terangkum di bawah kesalahan penipuan. Atas fakta kes ini, walaupun terdapat penipuan oleh pelanggan tersebut, ia adalah hanya untuk memudahkan perlakuan tindakan mencuri tersebut (lihat perenggan 12–14).

(3) Ia didapati bahawa klausa 8 pengecualian tidak beroperasi kecuali kejadian yang membawa kepada kerugian motokar tersebut boleh diambil kira sebagai sebab langsung kerugian atau sebab kerugian yang tidak boleh dielakkan. Dalam kes ini, sebab langsung kerugian motokar sebenarnya adalah tindakan mencuri oleh pelanggan dan bukan penipuan. Oleh itu, klausa 8 tidak beraplikasi dalam kes ini dan tidak terdapat konflik di antara peruntukan-peruntukan relevan klausa-klausa insurans (lihat perenggan 15 & 20).]

Notes:

For cases on policy of insurance, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 378.

Cases referred to

Hong Leong Assurance Bhd v Teoh Seow Chiew [2004] 3 AMR 417 (refd)
Lake v Simmons [1927] AC 487, HL (refd)
Reischer v Borwick [1894] 2 QB 548, CA (refd)
Taisho Marine and Fire Insurance (M) Sdn Bhd v Secure Guards Sdn Bhd [2001] 1 AMR 657, HC (refd)

Legislation referred to

Penal Code ss 27, 378, 415

Appeal from: Civil Appeal No W-02-1013 of 1996 (Court of Appeal, Putrajaya)

Nathan Maharajah (Ian Pereira with him) (Lawrence Pereira & Partners) for the appellant.
Sagadaven Thangavelu (N Navinderan with him) (Shearn Delamore & Co) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court in dismissing the respondent's claim for a sum of RM263,779.34 against the appellant under a policy of insurance issued by the appellant to the respondent.

[2] Before the High Court the appellant was the defendant and the respondent was the plaintiff. We shall refer the parties herein as they were before the High Court.

[3] The question for which leave to appeal to this court was granted is as follows:

In interpreting a policy of insurance to determine if a given event is covered under the policy, what are the rules of interpretation in the following circumstances:

(a) When the coverage agreement (section I — theft is covered) and the exclusion clause (exception 8 — cheating is excluded) are both applicable. Is the event (loss of the motor vehicle) covered?

(b) When the coverage agreement (section I — theft is covered) and the exclusion clause (exception 8 — cheating is excluded) are both applicable. Does the contra proferrantum rule of construction apply?

(c) When the exclusion clause (exception 8 — cheating is excluded) applies, must cheating be that of the insured (respondent)?

[4] The relevant facts of the case which can be discerned from the statement of agreed facts of both parties before the High Court are as follows:

(a) Pursuant to an application by way of a proposal form dated 11 August 1998 and in consideration of the premiums paid by the plaintiff, the defendant had issued a policy of insurance known as motor trade policy (road risk) to the plaintiff for the period 23 August 1998 to 22 August 1999 ('the policy').

(b) Pursuant to section I of the policy, the defendant had agreed to provide cover and to indemnify the plaintiff in respect of loss or damage to the motor vehicles arising from, inter alia, by fire, external explosion, self-ignition or lightning or burglary house breaking or theft.

(c) On or about 20 November 1998 during the currency of the policy the plaintiff's vehicle bearing Registration No W1180A model Mercedes Benz E230 ('the motorcar') was stolen by a third party representing himself as one Dato' Ahmad Rosli Bachik ('the said customer').

(d) The said customer had visited the plaintiff's showroom situated at No 129, Jalan Raja Muda Abdul Aziz, Kg Baru, 50300 Kuala Lumpur and indicated his intention to purchase a new motorcar model Mercedes Benz. The said customer was attended to by one En Ariffin bin Majid ('the plaintiff's sales representative').

(e) The said customer had requested to test drive the motorcar and was accompanied by the plaintiff's sales representative during the test drive.

(f) Whilst in course of test driving the motorcar the said customer had received a telephone call via his mobile phone. Subsequently, he stopped the said motorcar along Batu 5, Jalan Gombak, Kuala Lumpur and requested the plaintiff's sales representative to buy fried chicken from a Kentucky outlet.

(g) The plaintiff's sales representative went to buy the fried chicken and upon his return, he discovered that both the said customer and the motorcar had disappeared.

(h) At all material times, the said customer had misrepresented himself as Dato' Ahmad Rosli Bachik and that he had wanted to buy the motorcar.

(i) The plaintiff's sales representative had lodged a police report on 20 November 1998.

(j) The plaintiff had intimated a claim under the said policy for the sum of RM263,779.34.

(k) The defendant has repudiated liability under the said policy on the ground that the motorcar was stolen by way of cheating under general exception No 8 of the said policy.

[5] The insurance policy in question was produced and marked as documentary exh P3 before the High Court. The relevant part in respect of coverage under the policy relied upon by the plaintiff is as in cl 1 of section I — Loss or Damage, which reads as follows:

Section I - Loss or Damage

(1) The Pool will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon —

(a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear.

(b) by fire external explosion self-ignition or lighting or burglary housebreaking or theft.

The relevant part of the policy that was relied upon by the defendant to exclude itself from liability is under cl 8 of the general exceptions, which reads as follows:

8 Any loss or damage caused by or attributed to the act of cheating by any person within the meaning of the definition of the offence of cheating set out in the Penal Code. Cheating is defined in the Penal Code 'as whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

[6] The learned judge of the High Court dismissed the plaintiff's claim on the grounds that the loss of the motorcar was caused by cheating under the

general exception cl 8 of the policy and the negligence of the plaintiff itself in failing to take reasonable steps to safeguard the motorcar from the loss. The Court of Appeal allowed the plaintiff's appeal against the decision of the High Court and reversed the judgment of the High Court. The Court of Appeal held that the loss was due to theft.

[7] Learned counsel for the defendant submitted before us that the loss does not fall within the definition of theft in the Penal Code and as such is not within the ambit of the coverage of the policy. It is contended by the defendant that if it is held that the loss falls within the definition of theft the claim is only payable if none of the exclusion clauses apply. It is the defendant's case that cl 8 of the exclusion clause of the policy applies and it excludes any claim for cheating. The defendant further contended that even if the court finds that the loss was due to theft within the definition of theft in the Penal Code and the court finds that the loss also comes within the definition of cheating in the Penal Code, then the plaintiffs claim must still be dismissed because under the rules of construction of insurance policy terms and conditions if a claim falls within one of the exceptions, then it is not payable.

[8] Notwithstanding the above contention of the defendant, we are of the view based on the statement of agreed facts and the relevant clauses of the insurance policy (exh P3) the only issue for determination in this case is whether the events leading to the loss of the motorcar constituted theft or cheating. If it is theft, the defendant shall be liable, but if it is cheating, the defendant shall not be liable. It is to be noted that the Court of Appeal in its judgment did not make a finding that under the coverage clause of the policy where theft is covered and under the exclusion clause (exception 8) where cheating is excluded are both applicable to the facts of the case.

[9] It is observed that the term 'theft' in cl 1 of section I of the policy does not expressly stipulate any definition, whereas the term 'cheating' in the exclusion cl 8 expressly stipulates that the term is as defined under the Penal Code. On this point we endorsed the view expressed by the Court of Appeal in this case that since the liability or repudiation of liability hinges upon the commission of criminal offences, namely either theft or cheating, it is reasonable to visualise the facts within the scope or definitions under the Penal Code.

[10] Section 378 defines theft as 'Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft'.

The above definition in the Penal Code is followed by a few Explanations and Illustrations. Explanation 5 reads as follows:

A The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

B **[11]** On the other hand, cheating as defined under s 415 of the Penal Code, reads as follows:

Cheating

415 Whoever by deceiving any person, whether or not such deception was the sole or main inducement —

C

(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or

D (b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to 'cheat'.

E As with the definition of theft under s 378, the definition of cheating under s 415 is followed by a few explanations and Illustrations.

[12] We agree with the finding of the Court of Appeal that the loss of the motorcar was a result of the theft and not cheating. The said customer had dishonestly taken away the motorcar without the consent of the plaintiffs sales F representative. Although the said customer was given possession of the motorcar, it was only for a specific limited purpose, namely to test-drive accompanied by the plaintiff's sales representative. The consent if at all given by the plaintiff was not an unqualified one and was not for a false representation by the said customer. On this point we would refer to a passage G from the *Indian Penal Code* by Ratanlal & Dhirajlal (31st Ed), at p 2022 which states as follows:

The thing stolen must have been taken without the consent of the person in possession of it … But consent given under improper circumstances will be of no avail [vide ill (c)]. Consent obtained by a false representation which leads to a H misconception of facts will not be a valid consent.

[13] We could not agree with the contention of the defendant that if the court finds the loss was due to theft as well as the loss could also be attributed I to cheating then the plaintiff's claim would still not succeed. We find that the facts of the case could not fit with any of the explanations or illustrations as envisaged by s 415 of the Penal Code to fall under the offence of cheating.

[14] It is our considered view based on the facts of the present case even if

there is any element of deceit by the said customer it was just to facilitate the commission of the act of theft. On this point, it is appropriate to quote what Lord Atkinson said in *Lake v Simmons* [1927] AC 487 (HL) at p 511, which reads as follows:

> I think Miss Esme Ellison obtained the possession of the jewellery handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it, she feloniously appropriated it, is not disputed. But the operation of entrusting the possession of the jewellery but not the property in it to her, which prima facie, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation the woman made to the appellant, which he apparently believed, secondly, the action he took, acting on that belief, and third, the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her, furnished to her-as she intended it should — the opportunity for and means of committing the theft.

[15] As regards the application of the provision of cl 8 of the general exceptions to the insurance policy relating to the offence of cheating in the present case, we are of the view that an exception clause is not operative unless if the events leading to the loss of the motor vehicle can be regarded as the proximate cause of the loss or the inevitable cause of the loss. (See *The Law of Insurance Contracts* (4th Ed), 2002 by Malcolm A Clarke para 19–1C2 at p 583). On this point we also refer to the case of *Reischer v Borwick* [1894] 2 QB LR 548 wherein on the facts of the case the insurance policy covered 'only against the risk of collision (as per clause attached), and damage received in collision with any object, including ice'. The clause attached related to collision with other vessels and the policy did not include 'perils of the sea'. It was decided by Lindley LJ at p 551 that:

> ... The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other, each was as much a proximate cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy.

In the present case the proximate cause of the loss or the inevitable cause of the loss of the motorcar is in fact due to the act of theft by the said customer and not cheating.

[16] Back home, we would like to cite two case authorities and highlight the issue raised in the present appeal as to whether the events leading to the loss of the motor vehicle falls within the definition of theft in order to qualify for a claim under the insurance policy or it falls under the exception clause to

exclude liability. In both these cases our courts found that based on the factual circumstances of the case the loss of the motor vehicle was a result of theft and that it does not fall within the definition of any other specified offence under the exception clauses of the insurance policy.

[17] In the first case of *Taisho Marine and Fire Insurance (M) Sdn Bhd v Secure Guards Sdn Bhd* [2001] 1 AMR 657. The plaintiff's claim against the defendant was the amount payable under a policy of insurance issued by the defendant in respect of the plaintiff's motor-van ('the vehicle'). The vehicle was last used by an employee of the plaintiff who failed to return the same to the plaintiff or report back for duty. A police report was lodged by the plaintiff to the effect that the vehicle was missing and suspected to have been stolen. The defendant sought to exclude its liability pursuant to cl (iv) of the 'Exception to Section T' (the exception clause) of the policy, on the ground that it was not responsible for the loss of the vehicle which it contended, had resulted from the breach of trust by the plaintiff's employee. The issue for determination was whether the loss incurred by the plaintiff was due to theft which entitled the plaintiff to make the claim under the policy or criminal breach of trust which excluded the defendant's liability. KC Vohrah J, (as he then was) at p 664 stated:

> The court may presume having regard to human conduct that when the servant did not return that day with the van or at all to the plaintiff's premises he had dishonestly run away with it taking also into account that the salaries of the employees which he had to pay to them were never paid to the employees. In the context of s 378, illustration (d) read with s 27 of the Penal Code, the servant had dishonestly taken the van out of the plaintiff's possession without the plaintiff's consent. Thus the loss of the motor-van was due to theft committed by the security guard. If the security guard was not a servant illustration (d) would have fitted the case as the security guard would not have had possession of the van and therefore the plaintiff did not have possession of it and theft could not have been committed of the van but there probably was criminal breach of trust.

[18] In the second case of *Hong Leong Assurance Bhd v Teoh Seow Chiew* [2004] 3 AMR 417, the sessions court and the High Court on appeal had to determine whether the loss of the motorcar was due to 'theft' or 'cheating'. The plaintiff was the owner of the motorcar and the defendant was an insurance company. The plaintiff had sent the motorcar to a Petronas Wash to be washed and vaccumed. He surrendered the motorcar and the keys to the owner of the car wash and left the premises. After about an hour, the owner returned to collect the motorcar but was told that a Malay man had taken the motorcar. Raus Sharif J (as he then was) upheld the finding of the trial judge that the loss was due to theft and not cheating.

[19] The learned trial judge of the High Court also found that the plaintiff had been negligent in failing to take reasonable steps to safeguard the motorcar

from the loss and for this reason the plaintiff is not entitled to make the claim under the insurance policy. On this issue we agree with the finding of the Court of Appeal that from the facts of the case there is not a single element to show that the plaintiff's sales representative was deliberately courting danger. We are of the view he was deceived into leaving the car with a view to oblige the said customer as a potential buyer. No reasonable man would have foreseen that such a potential buyer who had portrayed himself as a man of some standing in society would have acted in such a manner. In the circumstances of this case it is our judgment that the plaintiff had not acted recklessly. At any rate on this issue we could not find anywhere in the insurance policy that the act of negligence on the part of the insured is provided for as an exclusion clause to defeat the claim made by the insured.

[20] In conclusion we would state here that since we have affirmed the finding of the Court of Appeal that the loss is due to theft and not cheating, there is therefore no conflict between the relevant provisions of the insurance clauses for our determination. The questions posed in this appeal are now purely academic. For completeness we would nevertheless answer the questions posed by stating that the court ought not to interpret the clauses of the insurance policy which would result in the insured loosing the benefits of the coverage what it appears to have granted under the coverage clause by applying the exclusion clause to exclude liability. Therefore, questions (a) and (b) are answered in the affirmative. Since the exclusion cl 8 of the insurance policy relating to offence of cheating does not apply in this case there is no necessity for us to answer question (c).

[21] For the reasons abovestated we dismiss with costs the appeal by the defendant. We award a sum of RM30,000 as costs to the plaintiff. Deposit to the plaintiff towards costs.

Appeal dismissed with costs.

Reported by Kohila Nesan